



John A. Shea v. USA

12/11/2018

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# 1 PROCEEDINGS

3 (Proceeding called to order, 10:03 a.m.)

4 THE COURT: Good morning.

5 ALL COUNSEL: Good morning, Your Honor.

6 THE COURT: The case before the Court this  
7 morning is John Shea vs. United States, Case Number  
8 16-793. We are here for a pretrial conference.

9                   The Court presumes the parties have looked at the  
10   fairly standard final pretrial orders the Court has  
11   issued in recent cases that have come up for trial.  
12   I've certainly looked at the parties' papers, and I  
13   think we're ready to proceed.

14                   Before we do and go down through the checklist of  
15    items to be covered, do the parties have anything  
16    specific or unusual that they would wish to raise?

17 Ms. Lipsett?

18 MS. LIPSETT: Your Honor, my client --

19                   THE COURT: I ought to have asked you to identify  
20 yourself for the record as counsel for the Plaintiff and  
21 introduce your colleagues.

22 MS. LIPSETT: Yes, I will do that. Linda  
23 Lipsett, counsel for the Plaintiff. I am here with my  
24 colleagues, Daniel Rosenthal and Nari Ely.

25 THE COURT: All right, welcome.

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1                   Do you have anything out of the ordinary?

2                   MS. LIPSETT: No, I don't, but I would like to  
3                   defer to my colleague Daniel Rosenthal who is -- will be  
4                   lead counsel.

5                   THE COURT: All right. Just a moment.

6                   Yes. Will the Government's counsel please  
7                   introduce themselves. Mr. Kerr, will you introduce  
8                   yourself and your colleague, please, for the record?

9                   MR. KERR: Yes. Thank you, Your Honor. My name  
10                   is David Kerr. I represent the United States from the  
11                   Department of Justice. This is my colleague also from  
12                   the Department of Justice, Mariana Acevedo.

13                   THE COURT: All right, thank you. What is your  
14                   last name again, please?

15                   MS. ACEVEDO: Acevedo, A-C-E-V-E-D-O.

16                   THE COURT: Acevedo, got it.

17                   We are obviously scheduled for trial on Monday,  
18                   Tuesday, and Wednesday of the coming week, and the Court  
19                   had looked. There is an issue about a deposition  
20                   transcript, but we can cover that in due course. That's  
21                   the one unusual issue I thought I learned about.

22                   Why don't you take the podium and we will cover  
23                   this bit by bit.

24                   MR. ROSENTHAL: We do have a couple of other  
25                   issues that we wanted to bring to the Court's attention

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1 as well. So I can do that now or....

2 THE COURT: Why don't you do that now.

3 MR. ROSENTHAL: Okay. So the first issue relates  
4 to the order of presentation at the trial. It's a bit  
5 of an unusual situation in that there are two liability  
6 issues at the trial, whether or not Mr. Shea is exempt  
7 and then whether the Government had a reasonable and  
8 good faith basis for classifying him as exempt, and I've  
9 discussed this with government counsel.

10 The burden -- the Government has the burden of  
11 proof on both of those issues, and, in particular, on  
12 the second of those issues, the good faith/reasonable  
13 basis, it seems to make the most sense to us that we  
14 would not present evidence on that topic until the  
15 Government first sets forth its -- what its basis was.

16 So our intention, with the permission of the  
17 Court, was that when we present our initial case, we  
18 would present testimony about the exemption issue but  
19 not present testimony about the good faith/reasonable  
20 basis issue.

21 THE COURT: I don't see how you are going to be  
22 able to avoid presenting testimony on both issues.  
23 Frankly, the Court has a custom and practice of asking a  
24 witness or the counsel to provide testimony from a  
25 witness one time. In other words, it might be Mr. Shea,

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1 and he might testify regarding both issues, and he  
2 might -- he's designated by both parties, and he would  
3 testify once.

4 MR. ROSENTHAL: In this case, the issue I think  
5 relates more to the testimony of the HR person at NCIS.  
6 So if we were --

7 THE COURT: Is that Ms. Cruz or --

8 MR. ROSENTHAL: Yes, Ms. Cruz, as well as  
9 Mr. Freeman, the supervisor. So we would -- if we were  
10 going to present our entire case, we would call both of  
11 those as adverse witnesses as part of our initial  
12 presentation.

13 THE COURT: Why don't you do that.

14 MR. ROSENTHAL: Okay, sure.

15 So the second issue relates to -- there's a  
16 document that the parties have a bit of a disagreement  
17 about. It's a document that was produced to us about  
18 two weeks ago, and it's been -- it was redacted in its  
19 entirety by the Government, and our position was that  
20 that redaction is not -- is not proper.

21 So we can submit a motion laying that out more  
22 fully tomorrow, I believe, but I wanted to bring that to  
23 your attention.

24 THE COURT: All right, good. Why don't you do  
25 that.

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1                   I have a question, as I said, about the 30(b)(6)  
2 deposition transcript, but I can -- well, I can cover  
3 that now. Let me hear from Mr. Kerr, though, first.

4                   Mr. Kerr, would you join Mr. Rosenthal at the  
5 podium, and, Mr. Rosenthal, if you would not move too  
6 far, that would be helpful.

7                   MR. KERR: Thank you, Your Honor.

8                   Our objection -- I call it an objection, but the  
9 30(b)(6), it's been our practice and understanding that  
10 if counsel wants to use parts of a deposition, that  
11 those parts will be designated in advance.

12                  THE COURT: Yes.

13                  MR. KERR: So our only objection was that they  
14 should be designated in advance, which Mr. Rosenthal has  
15 provided us with designations.

16                  THE COURT: He has provided the --

17                  MR. KERR: Yes.

18                  THE COURT: -- and so you have the opportunity  
19 now to provide counter-designations?

20                  MR. KERR: Yes, Your Honor.

21                  THE COURT: Good. And this -- I take it,  
22 because it's a 30(b)(6) deposition, this falls under  
23 801(d)(2)(D), so there is no question about  
24 admissibility.

25                  MR. KERR: Yeah. We don't object to the

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1       admissibility of certain statements, but we did object  
2       just to the wholesale dumping of -- there are a lot of  
3       extraneous things in there, Your Honor.

4               THE COURT: No, I understand. I should warn  
5       everyone, though, that the Court requires that a  
6       deposition be actually read into the record. So you  
7       will need to have somebody, Mr. Rosenthal, acting as an  
8       interrogating counsel, and you'll need to have somebody  
9       in the witness stand just reading their responses,  
10      because I want to hear that testimony in the same way  
11      that I hear all the other witness testimony, and I don't  
12      want to just have a paper record.

13              MR. ROSENTHAL: Understood.

14              THE COURT: Is that helpful?

15              MR. ROSENTHAL: Yes.

16              THE COURT: All right.

17              Anything else, Mr. Kerr?

18              MR. KERR: Yes. There is one matter that  
19       actually arose yesterday.

20              THE COURT: Yes.

21              MR. KERR: And as Your Honor knows, there's a  
22       parallel case dealing with members of Mr. Shea's team,  
23       Root vs. United States, and the parties have been -- and  
24       it is no secret -- the parties have been negotiating  
25       settlement of both cases.

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1 THE COURT: What is the name of that case again?

2 MR. KERR: I believe it's Root vs. United States.

3 THE COURT: Let me just check.

4 MS. ACEVEDO: Your Honor, the docket number is

5 18 --

6 THE COURT: I'm sorry?

7 MS. ACEVEDO: The docket number is 18-734.

8 MR. ROSENTHAL: Well, when it was filed, it was  
9 actually called Sevigny vs. United States and then  
10 Mr. Root joined --

11 THE COURT: I have a note on Sevigny.

12 MR. ROSENTHAL: That's the same case.

13 MR. KERR: I apologize, Your Honor. I wasn't  
14 sure which plaintiff was -- but Sevigny vs. United  
15 States, it's the same.

16 THE COURT: It's the same case.

17 MR. KERR: Yes.

18 THE COURT: And you gave a notice -- or the  
19 Plaintiff did -- of the indirectly related case. Before  
20 whom is that?

21 MR. ROSENTHAL: Judge Wolski.

22 MR. KERR: The parties yesterday managed to  
23 settle that case, and the United States would just  
24 object to any terms of that settlement coming into  
25 evidence in this case.

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1                   THE COURT: Oh, I'm sure. Yes, absolutely.  
2                   MR. ROSENTHAL: Well, if I may, it actually  
3    wasn't exactly a settlement. It was an offer of  
4    judgment. So there will be a judgment issued by Judge  
5    Wolski.

6                   THE COURT: I know, but --

7                   MR. KERR: Yes. It was an offer of judgment,  
8    yes. I guess I was thinking that was the way the case  
9    was settled.

10                  THE COURT: The fact of the judgment just has no  
11   bearing on this case.

12                  MR. ROSENTHAL: Okay.

13                  MR. KERR: Thank you, Your Honor.

14                  MR. ROSENTHAL: If I just may follow up on that,  
15    one of the issues in the settlement relates to the  
16   classification of the employees there, which is going to  
17   be a fact I think at issue -- one of the issues in this  
18   case is going to relate to the classification of members  
19   of the team. So in that sense, it -- there may be -- it  
20   may be somewhat difficult to disentangle the change in  
21   classification and the settlement.

22                  THE COURT: Well, you can cover that as a factual  
23   matter at trial.

24                  MR. KERR: Well, Your Honor, we would object.

25   The change of classification came from the offer of

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1 judgment.

2 THE COURT: Oh, that's -- that's true. The  
3 judgment really has no res judicata effect at all on  
4 this case, and it certainly has no collateral estoppel  
5 effect on this case.

6 MR. ROSENTHAL: We're not suggesting that, Your  
7 Honor.

8 THE COURT: All right.

9 MR. ROSENTHAL: We're just suggesting that it  
10 is going to be a fact, as of next week, that Mr. Shea  
11 and his team members, under the same position  
12 description, doing the same duties, are not classified  
13 the same under the FLSA, and that is we think a fact  
14 that is part of the factual background of the case  
15 that's relevant.

16 THE COURT: Well, there was -- now, you're  
17 testing my memory a little bit, but I recall that -- I  
18 want to say GS, that's not exactly -- GS-9s and 11s were  
19 reclassified.

20 Do I have that right, Mr. Kerr?

21 MR. KERR: GS-9 -- 7 and 9, I think, yes.

22 THE COURT: Seven and 9, okay. Thank you for  
23 correcting me.

24 MR. ROSENTHAL: These people that I'm talking  
25 about are all GS-12s.

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1                   THE COURT: GS-12s? It is what it is.

2                   MR. KERR: They were GS-12s, but the fact of  
3                   their reclassification comes out of the offer of  
4                   judgment that the United States made in that case.

5                   THE COURT: It doesn't have any effect on this  
6                   case. Okay.

7                   MR. KERR: Thank you, Your Honor.

8                   THE COURT: All right. Shall we cover some items  
9                   that were -- that we should cover? I would propose --  
10                  and the parties may offer something different -- that  
11                  trial begin at 9:30 in the morning. Is that  
12                  satisfactory? If you want a different time, just tell  
13                  me.

14                  MR. KERR: That works for the Government, Your  
15                  Honor. Mr. Rosenthal?

16                  MR. ROSENTHAL: That's fine with us. Yes, thank  
17                  you.

18                  THE COURT: All right. Let's see. I've looked  
19                  at your witness lists and so on and so forth. We could  
20                  conclude at -- I've never concluded a trial earlier than  
21                  5:30, except under compulsion from a court when I  
22                  borrowed a courtroom from someplace else, and they  
23                  closed the courthouse at 4:30. But we could conclude at  
24                  5:00 if you want. I don't really care. It's up to you.

25                  MR. KERR: I just had a similar experience in

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1       Vermont, Your Honor.

2               THE COURT: Yes, I understand.

3               MR. KERR: They were shutting the doors a  
4       little earlier than we were used to.

5               THE COURT: That's right.

6               MR. KERR: 5:00, 5:30 is acceptable.

7               MR. ROSENTHAL: That's fine.

8               THE COURT: Okay, I think we will finish at 5:00.  
9       Let's finish at 5:00. We will do something a little  
10      unusual.

11              Would you like opening statements?

12              MR. ROSENTHAL: We would like to present an  
13      opening statement, and I also wanted to ask, Your Honor,  
14      we were thinking of using a PowerPoint presentation  
15      during the opening if the Court allows that.

16              THE COURT: As long as you've made sure that  
17      there are hard copies available, not only to Mr. Kerr  
18      but to the Court, that's fine.

19              Mr. Kerr?

20              MR. KERR: Yes, Your Honor. The Government would  
21      also like to make a short opening statement.

22              THE COURT: Fifteen minutes? Fifteen minutes.

23              MR. KERR: Yes. That's more than enough. Thank  
24      you, Your Honor.

25              THE COURT: All right. Then the time allotted

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1 for presentation of evidence, the Court would propose  
2 nine hours a side. I think that's generous in this case  
3 in the circumstances.

4 MR. ROSENTHAL: That should be more than enough.

5 MR. KERR: Yes, I agree, Your Honor. That's more  
6 than enough.

7 THE COURT: More than enough, okay.

8 Now, that doesn't include questions that the  
9 Court might ask -- and I will. I just -- I know from  
10 prior experience, I cannot resist asking questions, but  
11 unless there's something that a witness testifies to  
12 that I just don't understand, I will -- that, I will  
13 interject, but otherwise, I will wait until counsel have  
14 finished their direct examination and cross examination  
15 before I ask any questions. I don't want to interrupt  
16 the flow basically of your examination, except if  
17 something happens that I just don't understand.

18 Is that --

19 MR. KERR: Thank you, Your Honor. Yes.

20 THE COURT: -- is that -- but that would not  
21 include time for the witness to respond to my questions.

22 In addition, of course, it wouldn't include  
23 opening statements, but it also -- if there are  
24 evidentiary disputes that arise during trial, other than  
25 just a simple objection, I'm talking about an actual

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1 argument on an evidentiary issue, that time would not be  
2 included as well.

3 MR. ROSENTHAL: Understood.

4 MR. KERR: Okay.

5 THE COURT: Okay. You have a problem with a  
6 proposed trial exhibit, is that right, Mr. Rosenthal?

7 MR. ROSENTHAL: No, we --

8 THE COURT: It's not over the authenticity of  
9 that exhibit, I take it. It's over something else.  
10 Redactions?

11 MR. ROSENTHAL: Yes. Well, just to clarify, we  
12 have no problem with any of the exhibits identified by  
13 the Government. This is a document that was produced to  
14 us as part of a supplemental document production two  
15 weeks ago, and it was redacted in its entirety. We  
16 believe that was improper. We would like to see the  
17 document and then decide whether it may be something we  
18 might present at trial.

19 THE COURT: Mr. Kerr might have a view.

20 MR. KERR: Yes, Your Honor, thank you. The  
21 document in question is a draft position description  
22 that was made on direction of counsel in the interest of  
23 trying to reach a settlement in this case.

24 THE COURT: Ah.

25 MR. KERR: We think it's work product and not

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1 subject to disclosure.

2 MR. ROSENTHAL: We have a different view on that,  
3 Your Honor. The settlement discussions did not include  
4 any discussion about changing a position description.  
5 It did include changing the exemption status. So we  
6 would be okay with redacting that part of the position  
7 description because it relates to settlement.

8 But the remainder of the position description --  
9 position descriptions are not confidential documents.  
10 They're designed to be published and provided to  
11 employees.

12 THE COURT: In due course, they are.

13 MR. ROSENTHAL: Correct. And we rely on a line  
14 of cases that says a document in that scenario is not  
15 privileged, and it's also not a settlement-protected  
16 communication for two reasons.

17 First of all, as I said, we didn't discuss that  
18 in the settlement, other than the exemption issue. And  
19 second of all, under the Federal Circuit law, Rule 408  
20 is an admissibility rule. It's not a rule that allows  
21 you to redact a document that's provided in discovery.

22 THE COURT: On the other hand, this case is in  
23 litigation, and the agency counsel joins Mr. Kerr and  
24 Ms. Acevedo, and as counsel in the case, work product  
25 can arise.

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1                   MR. ROSENTHAL: Sure, work product can arise, but  
2 we don't believe this document is work product.

3                   THE COURT: All right. Well, I'm sure if you  
4 file a motion tomorrow, Mr. Kerr will respond promptly,  
5 and we can go forward and sort that out.

6                   MR. ROSENTHAL: Thank you.

7                   MR. KERR: Thank you, Your Honor.

8                   THE COURT: Okay. All right. So you are not  
9 really aware of any other authenticity or any other  
10 problems with exhibits.

11                  MR. KERR: No, Your Honor. There is one sort of  
12 administrative issue with an exhibit.

13                  THE COURT: Yes.

14                  MR. KERR: During the course of discovery, there  
15 were some confidential documents that we disclosed to  
16 Plaintiff, and the parties worked together to avoid the  
17 actual formality of a confidentiality agreement, but now  
18 we would like to use one of those documents at trial.

19                  So we would like at this point, now, to enter a  
20 confidentiality agreement and have that exhibit and only  
21 that small portion of the testimony about that exhibit  
22 sealed.

23                  THE COURT: All right. So you want basically a  
24 protective order respecting one document and the portion  
25 of testimony that relates to that document.

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1                   MR. KERR: That is correct, Your Honor, yes. A  
2 protective order.

3                   MR. ROSENTHAL: I am a bit surprised to hear this  
4 because, if I understand correctly, that particular  
5 document has not been identified as an exhibit by the  
6 Government, but -- previously. Is that correct? Are  
7 you talking about the standard operating procedures?

8                   MR. KERR: Yeah, the standard operating  
9 procedures, which I can't think of the exact exhibit  
10 number, but it has been marked by Defendant.

11                  THE COURT: Just a moment. I thought I saw it.

12                  MR. KERR: I think it's the second exhibit.

13                  MR. ROSENTHAL: The second exhibit is --

14                  MR. KERR: Okay, I'm sorry. I'm not to that  
15 point yet where I have the exhibits memorized, but I'm  
16 close.

17                  MS. ACEVEDO: It's Exhibit Number 2, Your Honor.

18                  MR. ROSENTHAL: Could I --

19                  THE COURT: All right. The Government's 2. I  
20 understand. I see it.

21                  MR. KERR: So this is the standard operating  
22 procedure of the team.

23                  THE COURT: Thank you, Ms. Acevedo.

24                  MS. ACEVEDO: You're welcome, Your Honor.

25                  MR. KERR: And the parties have been working

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1 on --

2 MR. ROSENTHAL: Oh, I see.

3 MR. KERR: -- you know, a request for protective  
4 order and the language for a protective order.

5 THE COURT: Well, if you have something that you  
6 want to propose to the Court, that's fine. Otherwise,  
7 something like that we can actually deal with at trial  
8 and put it on the trial transcript, if that eases your  
9 path a little bit.

10 MR. KERR: Okay, yes, thank you. That's very  
11 helpful, Your Honor. I've never done it this late in  
12 the stage of litigation.

13 THE COURT: I understand we have to be somewhat  
14 flexible.

15 MR. KERR: Okay.

16 MR. ROSENTHAL: I apologize. I see it now. I  
17 thinks I was thinking of the disclosure that you made  
18 prior to this. So, yes, we have no objection with  
19 handling it at trial.

20 THE COURT: We will deal with it -- unless you  
21 file a motion in advance, we will deal with that  
22 actually at trial.

23 MR. KERR: Thank you, Your Honor.

24 THE COURT: All right. Now, what the Court would  
25 appreciate is copies of -- well, a roadmap, in a sense a

20

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1 sheet that has -- two copies of a sheet that has three  
2 columns, the identifying number for each exhibit, a  
3 blank space for the Court to enter the name of the  
4 witness through whom the exhibit is either sought to be  
5 admitted or who later addresses that exhibit -- or  
6 earlier, for that matter -- and then a blank space for  
7 the Court to enter the disposition of any request to  
8 admit that exhibit into evidence at the trial.

9                   The Clerk and I will keep a tally as we go  
10 through, and what we're always endeavoring to do is,  
11 once we hit the end of a trial, we close the trial, but  
12 we do so without any loose ends or anything else. We  
13 don't want any post-trial motions respecting exhibits or  
14 testimony. Having a sheet like that will help us do  
15 that. We will just keep track of what you do during the  
16 trial.

17                   MR. KERR: Thank you, Your Honor.

18                   THE COURT: If you would work together to provide  
19 such a chart or sheet, that would be helpful.

20                   MR. KERR: Absolutely, Your Honor.

21                   MR. ROSENTHAL: Yes.

22                   THE COURT: All right. And it goes without  
23 saying, but we will say it, that each exhibit to be part  
24 of the trial record must be formally moved into evidence  
25 and admitted into evidence.

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1                   MR. KERR: Your Honor, if I may, we will also be  
2 tracking what exhibits go into evidence and are happy to  
3 compare at the end of the day to make sure everyone's on  
4 the same page.

5                   THE COURT: Right. We can -- and the Clerk will  
6 help in that respect.

7                   MR. KERR: Absolutely. Thank you.

8                   THE COURT: I would ask that counsel not engage  
9 in substantive discussions with a witness while any  
10 portion of that witness' testimony is pending. That's  
11 kind of -- it just solves all sorts of extraneous points  
12 and arguments.

13                  Do you have -- you don't really have expert  
14 testimony in this case at all.

15                  MR. KERR: No experts.

16                  MR. ROSENTHAL: No.

17                  THE COURT: So we don't have to deal with voir  
18 dire.

19                  MR. KERR: Correct, Your Honor.

20                  THE COURT: I would ask that you stand when  
21 addressing the Court, particularly if you have an  
22 objection, so I can tell. Otherwise, it might be a  
23 little sketchy and I probably can't tell. So if you  
24 will stand, that would be courteous of you and help just  
25 move things along.

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1                   Do you want to invoke Federal Rule of Evidence  
2    615 respecting sequestration of fact witnesses?

3                   MR. KERR: Yes, Your Honor. The Government would  
4    like to invoke that.

5                   THE COURT: Okay, that's done.

6                   MR. ROSENTHAL: And I take it that will not apply  
7    to Mr. Shea himself.

8                   THE COURT: I'm sorry? He's your party  
9    representative. He's the Plaintiff. Okay, except for  
10   Mr. Shea.

11                  MR. ROSENTHAL: Yes.

12                  THE COURT: All right. And the Government is  
13    entitled to a representative as well, and they can  
14    designate them at the outset.

15                  MR. KERR: Thank you, Your Honor.

16                  THE COURT: Now, as we discussed earlier, for  
17    witnesses called by one party, we would hope that all of  
18    that witness' testimony could be received at one time,  
19    so that we get the direct and the adverse testimony in a  
20    piece, and --

21                  MR. ROSENTHAL: The only question I would have  
22    about that would be a witness who may have something to  
23    say by way of rebuttal, who has already testified but is  
24    responding to something that's come up during the course  
25    of --

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1                   THE COURT: You can then recall that witness in  
2 rebuttal, but the limitation, of course, is on the  
3 topics of the further testimony.

4                   MR. ROSENTHAL: Understood, yes.

5                   THE COURT: Otherwise, the witness would be, if  
6 he's called by both sides -- and there are some that  
7 are -- the subject matter of the testimony would be the  
8 topics identified in the witness list, and so they might  
9 not overlap. In fact, they probably won't, but rebuttal  
10 is a little different.

11                  You obviously have a demonstrative in the sense  
12 that you have PowerPoint slides you mentioned in your  
13 opening.

14                  MR. ROSENTHAL: Yes, Your Honor.

15                  THE COURT: In this particular case, will there  
16 be any demonstrative evidentiary -- well, not  
17 evidentiary, but used during trial by either side?

18                  MR. KERR: At this time, Your Honor, the  
19 Government doesn't plan to use any demonstratives.

20                  THE COURT: All right.

21                  MR. ROSENTHAL: We don't --

22                  THE COURT: Mr. Rosenthal?

23                  MR. ROSENTHAL: We don't anticipate that.

24                  THE COURT: You do or don't?

25                  MR. ROSENTHAL: We do not, no, not at this time.

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1                   THE COURT: Well, if you do, if you give each  
2 other at least 24 hours advance notice, that would be  
3 helpful.

4                   And in this case, I know we've done a fair amount  
5 of work on this case already in terms of the pretrial,  
6 through your discovery and in the earlier motions, but I  
7 still would ask for post-trial briefing.

8                   MR. KERR: Absolutely, Your Honor.

9                   THE COURT: Okay. We can set that schedule at  
10 the close of trial.

11                  I would ask that the parties help the court  
12 reporter out a little bit with providing hard copies of  
13 the exhibits to the witness -- stickered copies, if you  
14 will -- and the court reporter can take those in hand if  
15 they're admitted as part of the official trial record so  
16 that the parties don't deal with it and the Court  
17 doesn't deal with it directly, but the reporter does in  
18 certifying the record of trial.

19                  So really you have two copies for -- one for the  
20 Court, one for the Clerk, and another for the witness.  
21 I should have clarified that a little bit. Is that  
22 okay?

23                  MR. KERR: Yes, absolutely, Your Honor. On the  
24 topic of exhibits, there are -- the binders for exhibits  
25 are very small. May I propose we put them both in the

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1 same binder just for the ease of --

2 THE COURT: Yes, that's fine.

3 MR. KERR: -- only having one binder?

4 THE COURT: Right. That's perfectly fine.

5 MS. ACEVEDO: Your Honor, just so I'm clear, can  
6 we have one set for all witnesses at the witness stand  
7 so that we don't have to make multiple copies for each  
8 of the witnesses? Would that be acceptable to Your  
9 Honor?

10 THE COURT: I don't see that there would be a  
11 problem. If you actually can get everything in one  
12 binder, I don't think that's a problem. If the witness  
13 can find the -- if you have it marked appropriately so  
14 the witness is not fumbling, that's perfectly fine with  
15 the Court.

16 MS. ACEVEDO: It just streamlines things on our  
17 end and makes it a little easier --

18 THE COURT: No, exactly.

19 MS. ACEVEDO: -- rather than having multiple  
20 copies for multiple witnesses.

21 THE COURT: I completely understand.

22 MS. ACEVEDO: Thank you, Your Honor.

23 THE COURT: You're welcome. In fact, I just came  
24 back from Houston on a post-discovery conference in a  
25 case that will be tried a little later in the winter,

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1 but that case is just the opposite of this one in the  
2 sense that -- I don't know how many, 10 or 12 experts,  
3 you know, it's videos, all sorts of other issues  
4 associated with it, a site visit, and it's just endless.  
5 So this is a welcome relief.

6 MR. KERR: And a few more exhibits, I assume.

7 THE COURT: Yes, exactly. Anyway, there will be  
8 days like that, too.

9 What else can we talk about?

10 MR. KERR: Well, just to remind the Court, on the  
11 exhibits, our exhibits, that won't contain the sealed --  
12 the document we want to put under seal, just a place  
13 keeper.

14 THE COURT: Just separately marked, and that will  
15 help the court reporter in handling the exhibit as well  
16 and the portion of the transcript to which it relates.

17 MR. KERR: Right. Thank you, Your Honor.

18 MR. ROSENTHAL: Sounds good.

19 THE COURT: Mr. Rosenthal?

20 MR. ROSENTHAL: I do not have any further, Your  
21 Honor.

22 THE COURT: All right. That's delightful.

23 MR. KERR: Your Honor, I have one more kind of  
24 scheduling --

25 THE COURT: Yes.

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1                   MR. KERR: Mr. Freeman is no longer working at  
2 NCIS. Obviously he will be available for trial, but his  
3 schedule this week is pretty hectic. I'm wondering if  
4 we could fix him on Tuesday morning, first thing, kind  
5 of take him out of turn.

6                   THE COURT: Well, I can't imagine that that would  
7 be a problem. This is -- any time you deal with a bench  
8 trial, the Court really is flexible as long as the  
9 parties have an agreement. That's just not a problem.

10                  MR. ROSENTHAL: That should not be a problem for  
11 us either.

12                  MR. KERR: Thank you.

13                  THE COURT: Tuesday morning?

14                  MR. KERR: Tuesday morning, yes.

15                  THE COURT: So that will be the 18th, the morning  
16 of the 18th.

17                  MR. KERR: Yes. Thank you, Your Honor.

18                  (Counsel conferring.)

19                  MR. KERR: Also, Your Honor, we wonder if we  
20 could have access to the courtroom Friday evening or  
21 Friday afternoon.

22                  THE COURT: I don't -- I'm sure we can, but I  
23 have no idea which courtroom we have. We could find  
24 out, and we will.

25                  MR. KERR: Okay.

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1                   THE COURT: The short answer is we will do our  
2 best, and we will -- that to us is a scheduling matter,  
3 and we will find out and we will -- the Clerk will call  
4 both counsel and give you advice if we know which  
5 courtroom. We probably know -- it probably is known  
6 now, but -- in the Clerk's Office, but we don't know it.

7                   MR. KERR: Okay. Thank you, Your Honor.

8                   THE COURT: No, thank you.

9                   MS. ACEVEDO: Your Honor, just one last item --  
10 I'm sorry -- with respect to the scheduling. We would  
11 like to using the anteroom behind the courtroom for a  
12 breakout room for our witnesses so that we can respect  
13 the Rule 615.

14                   THE COURT: Right. You have to make sure you  
15 have access to it.

16                   MS. ACEVEDO: Certainly. Do we do that through  
17 your Clerk or do we coordinate with the Clerk's Office?

18                   THE COURT: Clerk of the Court.

19                   MS. ACEVEDO: Thank you very much.

20                   THE COURT: Mr. Rosenthal, do you need help with  
21 a room for the same purpose?

22                   MR. ROSENTHAL: That would be helpful, yes.

23                   THE COURT: We will ask. So we have two things  
24 to ask. One is access to a witness waiting room,  
25 basically, and work room for counsel, and then the

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1 actual courtroom.

2 MS. ACEVEDO: Thank you, Your Honor.

3 THE COURT: No, thank you. We'll try to get this  
4 organized so it goes smoothly.

5 Okay. Anything further?

6 MR. ROSENTHAL: No.

7 MR. KERR: Nothing further --

8 THE COURT: Mr. Kerr?

9 MR. KERR: Nothing further. Thank you.

10 THE COURT: All right, thank you.

11 (Whereupon, at 10:30 a.m., the proceedings were  
12 adjourned.)

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1 CERTIFICATE OF TRANSCRIBER

2

3 I, Susanne Bergling, court-approved transcriber,  
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11 DATED: 12/17/2018 s/Susanne Bergling  
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